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FILED
FEB 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-933

In the Supreme Court of the United States

OCTOBER TERM, 1983

L. PATRICK GRAY, III, PETITIONER

v.

GRIFFIN BELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks tort damages from the United States and from individual government officials for an allegedly improper criminal investigation and indictment. The district court and the court of appeals dismissed petitioner's suit in its entirety.

1. In 1978 a federal grand jury sitting in Washington, D.C., indicted petitioner, a former Director of the Federal Bureau of Investigation, and two other high-ranking FBI officials, for conspiring to violate the civil rights of relatives and acquaintances of fugitive members of the Weatherman Underground Organization (Pet. App. A3-A4). The charge against petitioner was based primarily on his alleged issuance of a "generic authorization" of surreptitious entries into the homes of the friends and relatives of the Weatherman fugitives (*id.* at A4). Two years later, the government voluntarily dismissed the charges against petitioner, describing the charges as "unconvincing" (*id.* at A7).

Shortly thereafter petitioner filed this civil suit for damages against the United States, former Attorney General Griffin Bell, and various Justice Department attorneys involved in the prosecution (Pet. App. A7). Petitioner claimed damages for emotional, reputational, and physical injuries (*ibid.*). In his complaint he charged gross negligence in the preindictment investigation, willful violation of his Fifth Amendment rights during the investigation and grand jury proceedings, and common law malicious prosecution (Pet. App. A8). In addition, he alleged a claim against the United States under the Federal Tort Claims Act (FTCA) (Pet. App. A8). The district court dismissed petitioner's suit on the grounds that the individual respondents were immune from suit and that the "discretionary function" exception to the FTCA, 28 U.S.C. 2680(a), precluded the suit against the United States (Pet. App. A57-A79).

A unanimous panel of the court of appeals affirmed (Pet. App. A1-A53). The court held that the individual respondents were entitled to absolute prosecutorial immunity for their conduct during grand jury proceedings (*id.* at A23-A28) and that they were absolutely immune from common law suit (*id.* at A29-A31). Assuming arguendo that absolute immunity would not be available for non-grand jury investigatory activities, the court found respondents entitled to qualified immunity for those activities, on the ground that no "clearly established" constitutional duty required respondents to conduct their investigation "in any particular way" (*id.* at A28-A29). Finally, the court rejected petitioner's FTCA claim against the United States because (1) the "plain language" of the discretionary function exception indicates that it extends even to FTCA claims based on intentional torts of " 'investigative or law enforcement officer[s]' " (Pet. App. A33-A35), and (2) "[p]rosecutorial decisions as to whether, when and against whom to initiate prosecution are * * * immune under the discretionary

function exception[,]" and "[i]n this case, there is no meaningful way in which the allegedly negligent investigatory acts could be considered apart from the totality of the prosecution" (*id.* at A47, A51) (footnote omitted).

2. The court of appeals' comprehensive opinion, on which we rely, is correct and does not conflict with the decision of any other court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioner first contends (Pet. 15-25) that this Court should consider whether prosecutors are absolutely immune from suit in presenting evidence to grand juries. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), establishes that prosecutors acting within the judicial process are absolutely immune from constitutional or common law damages suits. Petitioner stresses (Pet. 15) that the Court in *Imbler* explicitly left open the question of a prosecutor's immunity when he is acting as "an administrator or investigative officer rather than * * * [as an] advocate"(424 U.S. at 430-431) (footnote omitted). But the court of appeals correctly regarded "it as settled that presentation of evidence to an indicting Grand Jury falls within the scope of advocatory prosecutorial conduct protected by *Imbler*" (Pet. App. A23) (footnote omitted). See also, *e.g.*, *Hampton* v. *Hanrahan*, 600 F.2d 600, 632 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980); *Slavin* v. *Curry*, 574 F.2d 1256, 1264, modified on other grounds, 583 F.2d 779 (5th Cir. 1978), overruled in part on other grounds, *Sparks* v. *Duval County Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 943 and 449 U.S. 1021 (1980); *Fine* v. *City of New York*, 529 F.2d 70, 74 (2d Cir. 1975); *Marlowe* v. *Coakley*, 404 F.2d 70, 70-71 (9th Cir. 1968), cert. denied, 395 U.S. 947 (1969).[1]

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[1]Petitioner cites only *Briggs* v. *Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978), in support of his contention (Pet. 18-24). But *Briggs* and this case were decided by the same court. The court here properly distinguished *Briggs* on two grounds: "First,

b. Petitioner next challenges (Pet. 25-30) the court of appeals' conclusion that respondents would be entitled at least to qualified immunity from a damages claim based on their non-grand jury investigatory activities. Petitioner contends that the court of appeals incorrectly applied the test for qualified immunity established by this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). According to petitioner, the court of appeals wrongly failed to inquire "whether respondents violated any well-established constitutional right," and instead asked merely "whether the means used to violate those rights were well-established as unconstitutional" (Pet. 26). But the distinction between these questions is not readily apparent. The point of the *Harlow* immunity test is that public officials may be held accountable in damages only for conduct they had reason to believe was unconstitutional, *i.e.*, only when they violate "clearly established statutory or constitutional rights." 457 U.S. at 818-819. Here, the court of appeals reasonably found that petitioner could not establish any "clearly established" right to the sort of "careful" and "thorough" preindictment investigation he demands (Pet. App. A28-A29). Petitioner cites no authority supporting the "clearly established" right for

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this case involved focused Grand Jury presentations, *i.e.*, conduct that was sufficiently adversarial to trigger concerns about retaliatory litigation. * * * Second, in the present case there were procedural safeguards * * * to remedy the alleged misconduct in the Government's Grand Jury presentations" (Pet. App. A25-A26). In addition, as the court of appeals noted (*id.* at A26-A27), the challenged conduct in *Briggs* did not involve the presentation of evidence to a grand jury, but alleged perjury committed by a prosecutor in court testimony about the ongoing investigation; and the grand jury investigation there had not focused on any particular suspect. When *Briggs* recently came before the court of appeals again, the case was dismissed on the ground that the prosecutor enjoyed absolute witness immunity under this Court's decision in *Briscoe* v. *LaHue*, No. 81-1404 (Mar. 7, 1983). *Briggs* v. *Goodwin*, 712 F.2d 1444 (D.C. Cir. 1983).

which he contends. His general references to "fair" and "unbiased" grand jury proceedings (Pet. 27-30) do not suffice, in the absence of authority identifying as unconstitutional the specific conduct in which respondents allegedly engaged.

c. Petitioner disputes the court of appeals' application of the FTCA discretionary function exception to respondents' investigatory and prosecutorial activities (Pet. 30-40). The lower courts occasionally have differed concerning the scope and meaning of the discretionary function exception, but they have not disagreed about application of the exception in cases in which, as here, the alleged underlying "tort" amounts to a challenge to a prosecutor's discretionary judgments. See *Smith* v. *United States*, 375 F.2d 243, 248 (5th Cir.), cert. denied, 389 U.S. 841 (1967). Here, as the court of appeals noted (Pet. App. A51-A52), the allegedly incomplete and biased investigation petitioner charges would not be an independent tort (as, *e.g.*, an improper search and seizure might be), but "is inextricably tied to the decision to prosecute and the presentation of evidence to the Grand Jury." [2] Thus, it clearly would be within the FTCA discretionary function exception. To the extent

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[2]Petitioner suggests (Pet. 36-40) that the discretionary function exception should not apply to the intentional torts of law enforcement officers, because otherwise 28 U.S.C. 2680(h) would be swallowed by the exception. But, as the court of appeals observed (Pet. App. A34), the "plain language" of the discretionary function exception states that it applies to " '*any* claim' " (emphasis in original) under the FTCA. In any event, the general immunity of the United States for prosecutorial misdeeds in no way eviscerates the FTCA's law enforcement provision, which typically comes into play when a police official makes an illegal search or arrest. Indeed, the district court in this case held the FTCA inapplicable because federal prosecutors, unlike, *e.g.*, FBI agents, cannot reasonably be characterized as "investigative or law enforcement officers" within the meaning of the FTCA (Pet. App. A75-A77). The court of appeals found it unnecessary to reach this question (*id.* at A35).

there may be disagreement among the courts of appeals concerning the scope of that exception, this case does not provide an appropriate occasion for this Court to address it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1984

DOJ-1984-02